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## CPLR 2104: Settlement Recorded by Justice in Chambers Is Valid

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sion, Second Department, following *Chernick v. Hartford Accident & Indemnity Co.*,<sup>78</sup> held that an infant plaintiff need not seek the court's permission to arbitrate his claim under an uninsured automobile endorsement, but may bring a plenary action against the insurer based on his claim.<sup>79</sup>

## ARTICLE 21 — PAPERS

*CPLR 2104: Settlement recorded by justice in chambers is valid.*

CPLR 2104 states that an agreement between parties or their attorneys regarding any matter in an action, other than one made between counsel in open court, is binding on a party only if made in a writing subscribed by him or his attorney or reduced to the form of an order and entered.<sup>80</sup>

In *Golden Arrow Films, Inc. v. Standard Club of California, Inc.*,<sup>81</sup> the parties reached a post-trial settlement at an hour when no court reporters were available. The court, in chambers, therefore, made its own "detailed, complete notes of the settlement terms."<sup>82</sup> Thereafter, the defendant sought to revoke the settlement since CPLR 2104 requires "oral" stipulations to be made in open court. Rejecting this argument, the trial court held for the plaintiff. The Appellate Division, First Department, affirmed,<sup>83</sup> stating that "[u]nder the unique facts and circumstances of this case, we hold that there was substantial compliance with CPLR 2104."<sup>84</sup>

Although better practice dictates that settlements be either written or entered in open court, the instant decision is just. The defendant, a close family corporation, was represented in the negotiations by its president, who later personally informed the court of his consent to the

<sup>78</sup> 8 App. Div. 2d 264, 187 N.Y.S.2d 534 (3d Dep't), *aff'd*, 8 N.Y.2d 756, 168 N.E.2d 110, 201 N.Y.S.2d 774 (1959). Although *Chernick* involved CPA 1448, the court stated that "the successor section in the CPLR (1209) has been held to be merely a recodification of section 1448, without any substantive change." 38 App. Div. 2d at 858, 330 N.Y.S.2d at 125, *citing* *Schneider v. Schneider*, 17 N.Y.2d 123, 127, 216 N.E.2d 318, 320, 269 N.Y.S.2d 107, 110 (1966).

<sup>79</sup> 38 App. Div. 2d at 858, 330 N.Y.S.2d at 125.

<sup>80</sup> Apparently, the court rejected the view that CPLR 2104 is inapplicable to settlements. This is consistent with other recent First and Second Department rulings interpreting CPLR 1204's exact predecessor, RCP 4. *See* 2A WK&M ¶ 2104.03 n. 19, *citing* *Solins v. Klosky*, 8 App. Div. 2d 848, 190 N.Y.S.2d 633 (2d Dep't 1959); *Anders v. Anders*, 6 App. Div. 2d 440, 179 N.Y.S.2d 274 (1st Dep't 1958); *Ariel v. Ariel*, 5 App. Div. 2d 168, 171 N.Y.S.2d 138 (1st Dep't 1958).

<sup>81</sup> 38 App. Div. 2d 813, 328 N.Y.S.2d 901 (1st Dep't 1972) (mem.).

<sup>82</sup> *Id.* at 814, 328 N.Y.S.2d at 902.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*, *citing* *Gass v. Arons*, 131 Misc. 502, 227 N.Y.S. 282 (N.Y. City Ct. Bronx County 1928) (deeming a settlement made in chambers as made in open court). *See generally* 2A WK&M ¶ 2104.03.

settlement. Indeed, the defendant never contested the existence or the terms of the agreement in question.<sup>85</sup>

#### ARTICLE 30 — REMEDIES AND PLEADING

##### *CPLR 3015: Particularity as to special damages.*

Subdivision (d), which required the itemization of special damages in the pleadings, has been repealed and subdivision (e) has been re-lettered as subdivision (d). Itemization of special damages is left to the bill of particulars.

A caveat to the bar: Special damages must still be pleaded where they are an essential element of a cause of action.<sup>86</sup>

##### *CPLR 3021: Mere allegation of improper verification does not mandate rebuttal.*

In 1965, section 741 of the RPAPL was amended to require verified petitions in proceedings to regain possession of real property. Thus, such petitions must be verified pursuant to CPLR 3021<sup>87</sup> to avoid the possible penalty for improper verification contained in CPLR 3022, viz., that such pleadings may be treated as a nullity if the adverse party so notifies opposing counsel.

In *Gould v. Pollack*,<sup>88</sup> the defendant contended that the petition had not been properly verified and sought to raise an issue of fact as to whether the petition had actually been verified. In rejecting these allegations, the New York City Civil Court, New York County, noted that the instant affidavit followed the form required by CPLR 3021.<sup>89</sup> Moreover, where no issue of fact as to the authenticity of the verification was shown, the plaintiff had "no duty . . . to call the Notary Public as a witness."<sup>90</sup>

The lack of any proof of irregularity concerning the petition's verification clearly justifies the instant decision, which forestalls the delay of summary proceedings which an opposite holding would have produced. Moreover, assuming *arguendo* that the petition was defectively verified, the CPLR states that "[d]effects [in pleadings] shall be ignored if a substantial right of a party is not prejudiced."<sup>91</sup>

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<sup>85</sup> 38 App. Div. 2d at 814, 328 N.Y.S.2d at 902.

<sup>86</sup> CPLR 3013.

<sup>87</sup> Note that the wording of the section is not mandatory. See 3 WK&M ¶ 3021.02. In addition the Court of Appeals has adopted a "substantial compliance" test for determining whether verification is proper. *In re Macaulay*, 94 N.Y. 574, 577-78 (1884).

<sup>88</sup> 68 Misc. 2d 670, 327 N.Y.S.2d 808 (N.Y.C. Civ. Ct. N.Y. County 1971).

<sup>89</sup> *Id.* at 676, 327 N.Y.S.2d at 815.

<sup>90</sup> *Id.*

<sup>91</sup> CPLR 3026. For a case adopting this approach, see *Capital Newspapers Div.-Hearst*